

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLEE**

76-7024

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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MARK RICHARD EDELSTEIN,

Plaintiff-Appellant,

-against-

NEW YORK TELEPHONE COMPANY and
COMMUNICATIONS WORKERS OF AMERICA
LOCAL 1104,

Defendants-Appellees.
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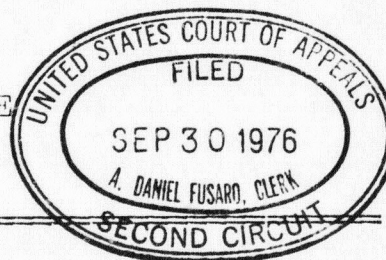
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P/S

Docket No.
76-7024

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF FOR DEFENDANT-APPELLEE
NEW YORK TELEPHONE COMPANY



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Preliminary Statement

Plaintiff appeals from a final judgment of the District Court for the Eastern District of New York (Weinstein, J.) dismissing his action against New York Telephone Company (hereinafter referred to as "Telco") and Local 1104 of the Communications Workers of America (hereinafter referred to as "CWA"). The complaint charges Telco with violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000-e et seq., for discriminating against plaintiff because of religion and sex (male). Plaintiff's action against the CWA was also based on alleged

discriminatory conduct and the failure of the union to fairly represent him.

Plaintiff's 85-page brief and the purported index which he has submitted on this appeal rehash the same factual claims that were decided adversely against him by the district court, and also raise some new factual claims which were never litigated. Inasmuch as this case involves a flat issue of credibility and no issues of law are raised in this appeal, we shall limit our brief to a view of the evidence which supports the district court's findings.

ISSUE PRESENTED

Whether the court's findings of fact are clearly erroneous.

PROCEEDINGS BELOW

The complaint charged Telco with the following acts of unlawful discrimination against plaintiff:

- 1) Denial of opportunities for promotion and advancement;
- 2) "Forcing" plaintiff to resign;
- 3) Denial of tuition refunds to which he was entitled by contract;

4) Refusing to give him a fixed work shift to enable him to attend college classes;

5) Unfairly giving him poor work ratings.

Plaintiff further claimed that the CWA had failed to represent him in grievances against the company, and had failed to act against certain union members because of harassment and threats of physical violence. (Compl., paras. II and VII.)

Plaintiff's case was based completely on his own testimony. At the close of plaintiff's evidence, Telco moved to dismiss all of the plaintiff's claims. The court reserved decision on this motion except as to plaintiff's claim based on the alleged improper denial of tuition refunds. As to this portion of the complaint, the court ruled as follows:

"As to the tuition refunds, I rule that the plaintiff did receive more than he was technically entitled to. The amounts involved approached a minimum quantity. But I don't believe he has shown by a preponderance of the evidence that there was any failure to comply with the tuition terms of the contract....

* * * *

"I find specifically that the number of applications were filed late. They were untimely and they could have been rejected in total.

"In addition, he was paid additional amounts for having completed a course when in fact he didn't complete the course.

* * * *

"I agree that [Telco] didn't pay it, but I find on the basis of the documents and what he said, that he did not comply with the terms of the agreement. He did not get the consent within the proper time. It's clear the company processed whatever claims he made very promptly.

"The document shows that this was a late filing with respect to the community college." (R. 351-353)*

After the presentation of Telco's evidence, the court dismissed all of the plaintiff's claims against Telco and made the following findings:

"The Court finds that the Defendant did not take any action against the Plaintiff because of any religious or sexual discrimination.

"His application for promotion was properly denied on the lack of qualifications and because he had a bad record for attendance.

"He was on step five in the Company policy and the Company policy was not to promote somebody in that position.

"He was not compelled to resign, he resigned voluntarily.

* "R.-" will hereinafter refer to page numbers of the transcript prepared by Court Reporter Harry Rapaport; "F.-" will refer to page numbers of the transcript prepared by Artie Froom.

"Each one of his suspensions was for a good cause.

"The evaluations of his work performed were made in good faith.

"He was treated in the same way that a person of another religion or sex would have been treated under the same circumstances.

"There was no discrimination of any kind in this case and, therefore, there is no basis for a judgment in favor of the Plaintiff." (F. 121-122)

No additional findings of fact or conclusions of law were requested by the parties.

POINT I.

THE COURT'S FINDINGS AND CONCLUSIONS ARE SUPPORTED BY SUBSTANTIAL EVIDENCE.

Each of the court's findings is supported by substantial evidence -- credible and for the most part conclusive -- in the form of either documentary proof or the testimony of Telco and CWA witnesses. Moreover, the plaintiff's testimony was so full of inconsistencies and gross improbabilities as to warrant a conclusion that it was unworthy of belief. Some indication of the district court's low opinion of plaintiff's credibility can be gathered from the fact that it reserved decision on Telco's motion to dismiss although the plaintiff's testimony, if credible, would certainly have supported a prima facie showing of

unlawful discrimination.

Consider the evidence with respect to each of plaintiff's allegations:

The Tuition Refunds

Plaintiff testified that he was denied a tuition refund for courses he took at Nassau Community College in 1970 and that his applications for refunds for courses he took at Hofstra University during the summer of 1972 were delayed, presumably because of malice towards him.

Plaintiff conceded, however, that he received a total of \$1,640. in tuition refunds during the 3-1/2 years he worked for Telco. (R. 204) His applications for tuition refunds, which are in evidence, show that plaintiff did not apply for refunds for the summer courses at Hofstra until March 1973, almost a year after the courses were taken. The applications were processed and paid promptly,* although, as the court found, plaintiff was not entitled to reimbursement because his applications were untimely

* Defendant's Exhibits G and H were dated April 30, approved by Michel, plaintiff's supervisor, 5/11, and by the next level of supervision 5/15, certified by the Registrar of Hofstra on 6/5, returned to Telco, and payment was authorized on 7/2, less than a month after the completed application was returned to Telco.

and he did not complete one of the courses. Telco's "Tuition Aid Plan" requires that applications for refunds be made within 60 days after satisfactory completion of the courses. (R. 199-204; Deft's Exhs. G and H)

At the trial, plaintiff testified that he had submitted to Bill Madden, his foreman, tuition aid applications for the courses he took at Nassau Community College. At a deposition taken on January 10, 1975, plaintiff said he had given the applications to a former supervisor of his named Morris. (R. 206-213) Plaintiff also testified that Michel had denied him a tuition refund because the courses took too long to complete, but in an earlier deposition he swore that the application was denied by Morris because the courses did not relate to the company. (R. 214-218)

Denial of Promotional Opportunities

Michel, plaintiff's supervisor, flatly contradicted plaintiff's testimony that Michel had told plaintiff that a sales position would be bad for him because of his "ethnic background" or that certain jobs were reserved for women only. (F. 16, 18, 20-22, 60-64)

Promotions and transfers within Telco are governed by what is known as the "Upgrade and Transfer Plan." Under

this program, employees are permitted to submit a maximum of two requests for transfer to different occupations in the company. These applications are then sent by a supervisor to a placement office. (Deft's Exh. Y, Sec. 2.2; R. 128, F. 20)

Plaintiff, a "Frameman," submitted two "Upgrade and Transfer" requests, one for "Special Sales Representative" and the other for "Garage Mechanic." Both jobs have a higher top wage rate than the Frameman's job. Although plaintiff testified that his applications were detained by Michel and never forwarded, these applications, which are in evidence, show that they were in fact processed and plaintiff was rejected for promotion because of his poor attendance and work performance. (Deft's Exhs. Q and R; R. 138, 139)

At the trial, plaintiff testified that he had repeatedly sought to get transferred to "Business Representative," a job with a lower pay rate than that of Frameman. But in all his letters to the company, answers to interrogatories, statements in support of his charges to the EEOC and pre-trial depositions, plaintiff claimed that he sought the higher-paid Special Representative's job, and he never once referred to the Business Representative's position. (R. 111-115, 123-143; Deft's Exhs. J, O, and M)

Plaintiff also testified during the trial that he tried to become a Business Representative in order to get a fixed work shift when he first began to work as a Frameman. Yet, according to his testimony, he was assigned to a "permanent" day shift during his first year with Telco. (R. 254-256)

The "Forced" Resignation

Plaintiff testified that his foreman, Frank Bove, informed him on July 30 that he was assigned as "permanent latrine orderly" of the frame and would thereafter be required to clean the men's room. He testified that he heard Bove mutter "Useless Jew bastard" under his breath at the time. (R. 63-66, 172, 173)

Frank Bove denied that he ever ordered plaintiff to clean the latrine, "degraded" him or made remarks about his religion. According to Bove, Edelstein, who had asked to be fired so that he could collect unemployment insurance, requested a 4-week leave of absence on the morning of July 30. Bove indicated that this would be difficult during the summer months, and plaintiff then left work for the last time, claiming to be ill. (F. 46, 94-96, 103, 108-109, 114)

The credibility of plaintiff's testimony concerning

the cause of his resignation was completely undermined by:

1) Letters he sent to Telco on July 31 and August 4, wherein he says that he was forced to resign because of a conflict between his work schedule and his college courses due to his removal from a steady 4-12 shift (Deft's Exhs. J and M);

2) His testimony at an Unemployment Insurance hearing in October 1973, wherein he gives entirely different reasons for his resignation (R 177-187, Deft's Exh. BB);

3) His NLRB charge, supporting affidavit and Notice of Appeal (Deft's Exhs. A, CC and D), none of which refers to his being directed to clean the latrines as a pretext for discharging him.

Plaintiff also testified that he had been unjustly suspended without pay on several occasions when he asked for help on a job requiring two men, and when he visited his grandmother. (F. 61-65) This testimony was controverted by Michel, Bove, Fee and Molinski, whose testimony was that plaintiff was suspended three times: once for failing to return to work as directed after he was given time off to visit his grandmother, and on two other occasions for refusing to push back wires on the frame, a

job normally done by Switchmen. (R. 365-368, 441-447, F. 31-39, 88-93)

The Refusal to Give Plaintiff a Fixed Tour

Under the collective bargaining agreement between Telco and the CWA, night tours are rotated among employees and there is a 10% pay differential for night work. (R. 276)

It is undisputed that plaintiff's fellow employees agreed to waive their rotational turns on the 4-12 shift so that plaintiff could remain on that shift and attend college courses. Michel testified that he eliminated that tour and substituted a 1-9 p.m. tour because there was no longer a need to have a "speaker man" working until midnight. (F. 6-7, 14-15)

The Allegedly Unfair Work Ratings

Plaintiff offered no evidence to substantiate this allegation, but Telco introduced evidence, including a running record of periodic evaluations of plaintiff's work from May 1970 through May 1973, showing a predominance of unsatisfactory ratings that, the court concluded, were made in good faith. (Deft's Exh. EE)

Miscellaneous Claims

We mention just a few:

Plaintiff testified that he was denied time off to observe the Jewish holiday of Rosh Hashana and he was forced to work that day, despite this affront to his religious conscience. (R. 19) But on cross, he admitted that he had never requested time off for Rosh Hashana and that, in fact, he was not an observant Jew. (R. 143-147)

On direct examination, plaintiff testified that Jerry Fee, a union steward, called him a "damned Jew" and a "kike." During the union's cross-examination, however, plaintiff admitted that he had testified, in a deposition taken September 5, 1974, that no union official or shop steward had ever made any malicious reference to his religion. (R. 294-297)

CONCLUSION

The evidence, far from showing that plaintiff was the victim of invidious discrimination, shows that he was, instead, given more consideration than he was entitled to under the collective bargaining agreement. He was enabled, by his foreman and his fellow employees,

to work a fixed tour for almost a year, despite the contractual provision that employees must rotate shifts. He received reimbursement for tuition expenses, to which he was not entitled.

The findings of the court below are thus supported by considerably more than substantial evidence, and its judgment should be affirmed.

Respectfully submitted,

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SAUL SCHEIER,
of Counsel.

Dated: New York, New York
September 29, 1976

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

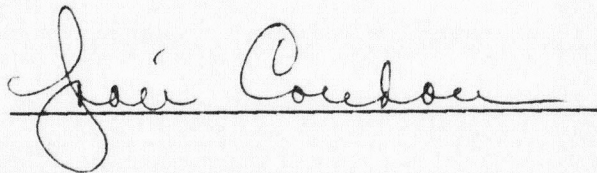
JOAN CONDON, being duly sworn, deposes and says that she is a clerk in the office of GEORGE E. ASHLEY, attorney for Defendant-Appellee NEW YORK TELEPHONE COMPANY herein; that on the 30th day of September, 1976, she served a copy of the within Brief for Defendant-Appellee NEW YORK TELEPHONE COMPANY on each of the following:

MARK RICHARD EDELSTEIN
Attorney Pro Se
1862 Leonard Lane
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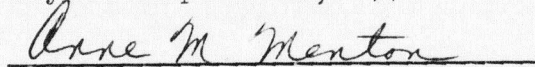
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by mailing a copy securely enclosed in a postpaid wrapper, in a post-office box regularly maintained by the United States Government at 1095 Avenue of the Americas, New York, New York 10036, directed to each of the above named at the address shown above, that being the address designated for such purpose upon the preceding papers in this matter.

Deponent is over the age of 18 years.



Sworn to before me this 30th
day of September, 1976



Notary Public

ANNE M. MENTON
Notary Public, State of New York
No. 41-4615873
Qualified in Queens County
Cert. filed in New York County
Commission Expires March 30, 1977